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No. 76-21

In the Supreme Court of the United States

OCTOBER TERM, 1976

**JAMES J. BERTUCCI, A/K/A/ FRANK JAMES
BERTUCCI, ET AL., PETITIONERS**

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

**ROBERT H. BORK,
*Solicitor General,***

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OPINIONS BELOW

The opinion of the court of appeals (P. App. 1a-13a) is reported at 532 F. 2d 1144. The opinion of the district court is unreported.¹

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1976, and a petition for rehearing with suggestion for rehearing *en banc* was denied on June 4, 1976 (Pet. App. 14). The petition for a writ of certiorari was filed on July 6, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

¹A copy of the district court's opinion, which is not included in the appendix to the petition, is being lodged with the Clerk of this Court.

QUESTION PRESENTED

Whether the search of petitioners' van and of cartons contained in the rear of the van was lawful.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Illinois, petitioners were convicted on two counts of possession of stolen merchandise, in violation of 18 U.S.C. 659. Petitioner James Bertucci was sentenced to three years' imprisonment, followed by a probationary period of two years. Petitioners Joseph Argento and Phillip Abbott were sentenced to two years' imprisonment, followed by two years' probation. The court of appeals affirmed, one judge dissenting (Pet. App. 1a-13a).

The evidence adduced at a pre-trial suppression hearing and at trial showed that at 1:30 a.m. on November 17, 1974, Illinois State Troopers Donald Pabst and Clyde Paris observed a van weaving back and forth across the center line of a highway. The officers directed petitioner Bertucci, who was driving the van, to pull off the road. Petitioner Bertucci complied and then stepped out of the van and met the two officers, who advised him of the reason his vehicle had been stopped. Upon request, petitioner Bertucci displayed his driver's license and told the officers that he had been weaving across the highway because he was sleepy (H. 3-7; Tr. 9-12, 20-21).²

Officers Pabst and Paris moved to the front of the van to inspect that portion of it for alcohol or weapons (H. 7, 14, 18, 23; Tr. 21). As they did so, petitioner Bertucci stepped in front of Officer Pabst and "indicated [that] he didn't want him to look in the van for some reason or

²"H." refers to the transcript of the pre-trial suppression hearing held on June 5, 1975.

another" (H. 7). The officers then shined their flashlights through the front windows of the van and observed petitioner Abbott in the passenger seat, cartons with invoice envelopes attached to them in the rear of the van (H. 7-8, 12, 14, 22-23; Tr. 21), and petitioner Argento lying "spread eagle" on his stomach over the tops of the cartons (Tr. 11-12). When Officer Pabst asked what the men were doing with the van, petitioner Bertucci replied that they were moving his aunt's possessions from Evansville, Indiana to Chicago (H. 13-14; Tr. 12-13, 21-22).

As the officers peered through the rear window of the van, they noticed that one of the invoices attached to a carton showed that the box contained new stereo equipment and that a hardware store in Beaver Dam, Kentucky, was identified as the intended recipient of the shipment (Tr. 14). Petitioner Bertucci immediately changed his explanation for using the van, now stating that his aunt had bought the merchandise in Evansville and that he and the others were bringing it to Chicago for her (H. 10, 15). When the officers asked petitioner Bertucci if they could inspect the boxes more closely, he replied "yes" and opened the back door of the van for them (H. 9, 14, 17, 19-21; Tr. 14, 22). After reading one of the invoices, the officers asked petitioners if they would be willing to drive the van to the police station, where there was better lighting and security (Tr. 14). Petitioners agreed and told the officers that if they could make some telephone calls at the station, they would prove that the boxes had been picked up for petitioner Bertucci's aunt (H. 10; Tr. 23-24).

At the police station, the officers opened the shipping cartons and discovered that they contained blue jeans and stereo components. Officers Pabst and Paris also learned through a telephone call that a Beaver Dam shopkeeper had ordered the goods weeks earlier but had not received them. After petitioners were advised of their

Miranda rights, they gave yet a third explanation for their possession of the goods, which several telephone calls failed to substantiate. Petitioners were then arrested for possession of stolen property (H. 10-13, 15-16, 21; Tr. 14-17, 23-26, 31-33).

ARGUMENT

1. Petitioners do not challenge the legality of their stop by the police or the initial inspection of the front of their van for alcohol or weapons (Pet. 8), but they contend that the officers lacked authority to search the rear portion of the van or the cartons. As the court of appeals correctly concluded (Pet. App. 5a), however, petitioners freely consented to the search of those areas. After an initial reluctance to permit inspection of the van, petitioner Bertucci changed his mind and, upon the officers' request for permission to examine the cartons more clearly, replied "yes" and opened the rear door. A moment later, petitioners agreed to drive to the police station, where the lighting and security were better; indeed, they even stated that they would make telephone calls at the station that would clear them of suspicion.

Petitioners' consent clearly satisfied the standards of voluntariness announced by this Court in *United States v. Watson*, 423 U.S. 411, 424-425, and *Schneckloth v. Bustamonte*, 412 U.S. 218, 227-234. Petitioner Bertucci was not under arrest when he consented to the inspection of the cartons,³ and his "consent was given while on a public [highway and] not in the confines of the police station." *United States v. Watson*, *supra*, 423 U.S. at 424. He consented almost immediately, rather than after lengthy and "subtly coercive" police questioning (*Schneckloth v. Bustamonte*, *supra*, 412 U.S. at 299), and, as

³See n. 4, *infra*.

the court of appeals noted (Pet. App. 5a), "[t]he record discloses no overt act, threat of force, promise or other form of coercion suggesting that the [consent] was other than voluntary." Furthermore, from the officers' initial request to inspect the rear of the van until the search of the cartons at the police station, neither petitioner Bertucci nor the other petitioners voiced any objection to the search. Measured by "the totality of all the circumstances" (*Schneckloth v. Bustamonte*, *supra*, 412 U.S. at 227), therefore, petitioners' consent to the search of the cartons was voluntary.

2. The district court (H. 26) and the court of appeals (Pet. App. 4a-5a) also correctly concluded that Officers Paris and Pabst had probable cause to search the cartons in petitioners' van. Although petitioner Bertucci had told the officers that he and the other men were moving his aunt's possessions from Evansville, Indiana, to Chicago, the invoice envelopes, which were exposed to view from outside the van, revealed that the cartons contained stereo equipment that had apparently been ordered by a hardware store in Kentucky. In view of the position in which petitioner Argento was discovered, petitioner Bertucci's initial hesitation to permit the officers access to the van, and the subsequent changes in petitioners' story, the officers had reasonable grounds to believe that the van and the cartons contained evidence of a crime. Since the officers had probable cause to inspect the vehicle on the highway, their later search without a warrant at the police station was lawful. *Texas v. White*, 423 U.S. 67; *Chambers v. Maroney*, 399 U.S. 42.⁴

⁴Although petitioners also contend (Pet. 11-14) that they were arrested on the highway without probable cause, the record establishes that their arrest occurred only after they had given a third false explanation for their possession of the merchandise at the police station and after the police had learned that the goods were part of

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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a shipment that had not been received by its owner (H. 10-13, 15, 21). Furthermore, Officers Pabst and Paris did not draw their guns or frisk petitioners on the highway, and petitioners proceeded to the police station in their own van, unaccompanied by the officers. Those factors clearly indicate that petitioners were not arrested until after their arrival at the station. In any event, since the search in this case was justified by petitioner's consent and by probable cause, rather than as incident to their arrest, no evidence introduced at trial was attributable to their arrest.

The government's petition for a writ of certiorari in *United States v. Chadwick*, No. 75-1721, presents the question whether a search warrant is required before law enforcement officers may open a closed footlocker which they have probable cause to believe contains contraband. There is no need to hold this case pending the disposition of *Chadwick*, however, since *Chadwick* does not involve the nature and scope of the automobile search exception. Furthermore, as noted above, see p. 4, *supra*, petitioners' consent is an independent ground on which to sustain the search conducted by the officers.